Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

ANTHONY G. SCARIANO,

Petitioner,

v.

JUSTICES OF THE SUPREME COURT OF THE STATE OF INDIANA, and MEMBERS OF THE STATE BOARD OF LAW EXAMINERS OF THE STATE OF INDIANA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Indiana's rule allowing an attorney to be admitted to practice based upon an out-of-state license only if the attorney practices less in other states than in Indiana violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

II. Whether Indiana's rule allowing an attorney to be admitted to practice based upon an out-of-state license only if the attorney practices less in other states than in Indiana violates the Commerce Clause of Article I of the United States Constitution.

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Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony G. Scariano respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on October 26, 1994.

REFERENCE TO REPORTS OF OPINIONS BY COURTS BELOW

Scariano v. Justices of the Supreme Court of the State of Indiana, 38 F.3d 920 (7th Cir. 1994)

Scariano v. Justices of the Supreme Court of the State of Indiana, 47 F.3d 173 (7th Cir. 1995)

Scariano v. Justices of the Supreme Court of the State of Indiana, 852 F.Supp. 708 (S.D.Ind. 1994)

STATEMENT OF JURISDICTION

The judgment from which review is sought was entered by the United States Court of Appeals for the Seventh Circuit on October 26, 1994.

A timely petition for rehearing with suggestion for rehearing en banc was filed on November 9, 1994. That petition and suggestion were denied on February 2, 1995.

Jurisdiction to review the judgment of the Court of Appeals in question by writ of certiorari is conferred by 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

Constitution of the United States of America, *Amendment XIV, Section 1*, in pertinent part:

> "nor shall any State deprive any persons of life, liberty, or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States of America, *Article I, Section 8*, in pertinent part:

"The Congress shall have Power

* * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . . "

Indiana Rules for Admission to the Bar and the Discipline of Attorneys

Rule 6 Admission on Foreign License

"(1) A person who has been admitted to practice law in the highest court of law in any other state or territory of the United States or the District of Columbia, may be conditionally admitted to practice law in Indiana upon a finding by the State Board of Law Examiners that said person has met each of the following conditions:

(a) The applicant has actively engaged in the practice of law for a period of at least five (5) of the seven (7) years immediately preceding the date of application. "Engaged in the practice of law" shall mean:

(i) regularly performing legal services for the general public as a lawyer; or

(ii) employment on a full-time salaried basis by a governmental or business entity as a lawyer performing duties of which admission to the practice of law is a prerequisite; or

(iii) teaching law on a full-time basis in an accredited law school; or

(iv) serving as a judge of a court of record; or

(v) a combination of the above.

(b) The applicant is a member in good standing of the bar(s) of admission.

(c) The admission of the applicant is in the public interest.

(d) The applicant meets the character and fitness requirements of Indiana.

(e) The applicant has paid or tendered the required fee.

(f) The applicant has not failed the Indiana Bar Examination within two (2) years of the date of application.

(g) The applicant has filed along with the application an affidavit of the applicant's intent to engage actively and predominately in the practice of law in Indiana.

(2) The applicant shall submit his application accompanied by a fee of seven hundred fifty dollars ($750). The Executive Director of the Board may refer said application to the National Conference of Bar Examiners for investigation and report. The Board is authorized to pay all expenses incident to the investigation of the qualifications of the applicant. However, in the event said application is considered and denied by the Board prior to referral to the National Conference, the Board is authorized to refund to the applicant one half (1/2) of the application

fee. No part of the application fee shall otherwise be refunded.

(3) Said conditional admission of a foreign license may continue in force for one year, and may be renewed for a like period upon the submission of such verified individualized information as will demonstrate to the satisfaction of the board that the applicant has during the past year been both (a) actively engaged in the practice of law and (b) predominately in Indiana. Each application for renewal of conditional admission shall be accompanied by a fee of $50.00. Upon the fifth consecutive renewal granted to the applicant, the admission to practice shall be permanent.

(4) Applicants conditionally or permanently admitted on foreign license are subject to, and shall comply with, the Admission and Discipline Rule, the Rules of Professional Conduct, and all other requirements of statute and Supreme Court Rules."

STATEMENT OF THE CASE

While the State of Indiana admits attorneys to the practice of law upon passing a bar examination, Rule 6 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys ("Rule 6") creates an exception to the bar examination requirement for those attorneys already admitted to practice in other states who meet several requirements. Among those requirements are those that the attorney have a sufficient level of experience, obtain continuing legal education, and demonstrate an active practice in Indiana. None of these requirements has been

challenged in this case. Rule 6 further provides that the applicant both swear that he or she intends to practice predominately in Indiana and thereafter demonstrate for each of the next five years that the applicant has actually practiced predominately in Indiana (hereinafter referred to collectively as the "predominant practice requirement"). Respondent State Board of Law Examiners has issued an interpretation of this provision defining a practice "predominantly in Indiana" as one which "in terms of the overall time spent," involves as much or more practice "dealing with Indiana law, representing Indiana clients, or handling cases in Indiana courts" as with "practice in any other jurisdiction."[1]

Petitioner is an Illinois attorney meeting all of the requirements for an admission under Rule 6 except the predominant practice requirement. Respondents are the state officials who promulgate, interpret, and enforce Indiana's bar admission rules, including Rule 6. In his complaint and on appeal, Petitioner has challenged the validity of the predominant practice requirement under both the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause of Article I of the United States Constitution.

The United States District Court for the Southern District of Indiana dismissed the complaint with prejudice. *Scariano v. Justice of the Supreme Court of the State of*

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[1] While Rule 6 uses the word "predominately," the State Board of Law Examiners defined the term "predominantly." Both courts below and the parties have adopted the term "predominant practice requirement" and Petitioner continues that practice here.

Indiana, 852 F.Supp. 708 (S.D.Ind. 1994). A panel of the United States Court of Appeals for the Seventh Circuit affirmed the dismissal. *Scariano v. Justice of the Supreme Court of the State of Indiana*, 38 F.3d 920 (7th Cir. 1994). Upon a petition for rehearing with a suggestion of rehearing en banc, rehearing and rehearing en banc were denied. Three circuit judges, however, dissented from the denial of the rehearing en banc and Chief Circuit Judge Posner filed a dissenting opinion. *Scariano v. Justice of the Supreme Court of the State of Indiana*, 47 F.3d 173 (7th Cir. 1995)

Federal subject-matter jurisdiction in the District Court was based on 28 U.S.C. §§ 1331 and 1343 in that this matter involves both federal law questions and civil rights claims. The action was brought pursuant to 42 U.S.C. §§ 1983 and 1988.

SUMMARY OF ARGUMENT

1. Review by this Court is warranted because of the importance of the state bar admission rule at issue. Review is also warranted because the Court of Appeals decision below conflicts with this Court's standards for analyzing equal protection and commerce clause claims by reviewing the validity of the admission rule as a whole rather then the aspect of the rule which is challenged and by weighing the presumed effect on commerce of a rule which expressly discriminates against interstate commerce.

2. The state bar admission rule at issue permits experienced attorneys with out-of-state law licenses to

practice in Indiana without passing a bar examination only if they practice less in the other state than in Indiana. This comparison of the relative amounts of an attorney's in-state to out-of-state practices violates equal protection because it does not rationally serve any legitimate governmental purpose. The classification does not logically result in the admission of attorneys more familiar with Indiana law.

3. This court's precedents shows that an attorney's demonstrable "commitment" to one state over another does not by itself rationally cause that attorney to become more familiar with that state's law.

4. Equal protection analysis requires a comparison of those similarly situated except for the classification at issue. It does not permit a court to compare the plaintiff to those also denied the state benefit but for different reasons, which is what the Court of Appeals did.

5. Because the state bar admission rule at issue conditions easier access to an Indiana law license for practicing attorneys based on the relative amount of the attorney's out-of-state business, the rule constitutes direct discrimination against interstate commerce and, therefore, violates the Commerce Clause.

6. The Court of Appeals erred in weighing the extent of the burden on commerce after it concluded that the rule directly discriminated against interstate commerce.

7. Even if the Commerce Clause balancing test were to be used, the absence of a legitimate governmental objective served by the rule should render it invalid.

ARGUMENT FOR GRANTING WRIT

I. THE QUESTIONS PRESENTED WARRANT REVIEW BY THIS COURT BECAUSE OF THEIR IMPORTANCE AND BECAUSE THE COURT OF APPEALS' DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

In recent years, this Court has several times reviewed the standards set by the states or lower federal courts for admission of attorneys to the practice of law, especially in the context of restrictions on attorneys from other jurisdictions. See, *e.g.*, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 84 L.Ed.2d 205, 105 S.Ct. 1272 (1985); *Frazier v. Heebe*, 482 U.S. 641, 96 L.Ed.2d 557, 107 S.Ct. 2607 (1987); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 101 L.Ed.2d 56, 108 S.Ct. 2260 (1988); *Barnard v. Thorstenn*, 489 U.S. 546, 103 L.Ed.2d 559, 109 S.Ct. 1294 (1989). None of these cases, however, has involved the sort of Equal Protection Clause and Commerce Clause challenges raised here. This Court's attention to such bar admission rules demonstrates the importance of these rules to the administration of justice and the relationship of the states within our federal system. The present case, however, involves a rule amended after the cited cases and which, while it avoids the precise deficiencies present in the rules invalidated in those cases, runs afoul of distinct constitutional standards.

Further, as discussed more fully below in Parts IIC and IIIB, the Court of Appeals' decision analyzed the constitutional claims in a manner directly in conflict with this Court's precedents. First, in assessing the validity of the specific classification in the bar admission rule at issue in Petitioner's equal protection claim, the Court of Appeals did not compare how Petitioner was treated to those falling into the other class within the rule, but only to those who would not come within the reach of the rule for different reasons. (App. 7-10, 38 F.3d at 924-25.) This "bootstrap" analysis was expressly rejected in *Williams v. Vermont*, 472 U.S. 14, 27, 86 L.Ed.2d 11, 105 S.Ct. 2465, 2474 (1985). Second, after it acknowledged that the "rule also clearly imposes differential burdens on attorneys practicing more out of state than in state," the Court of Appeals did not invalidate the rule as a regulation facially discriminating against interstate commerce, but instead balanced the perceived effect on interstate commerce. (App. 12-17, 38 F.3d at 925-28.) This approach violates numerous precedents of this Court, including *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 80 L.Ed.2d 388, 104 S.Ct. 1856 (1984).

II. THE PREDOMINANT PRACTICE REQUIREMENT VIOLATES THE EQUAL PROTECTION CLAUSE.

A. CONDITIONING EASIER ACCESS TO PRACTICE LAW IN INDIANA UPON AN ATTORNEY'S RELATIVE LACK OF BUSINESS OUT-OF-STATE DOES NOT RATIONALLY SERVE ANY LEGITIMATE STATE INTEREST.

Despite the authority of states to regulate admission to the practice of law in their courts, a state may not

exclude a person from the practice of law or from any other occupation in a manner that contravenes the United States Constitution. *Schware v. Board of Bar Examiners of the State of New Mexico*, 353 U.S. 232, 238-39, 1 L.Ed.2d 796, 77 S.Ct. 752, 756 (1975). Here, Petitioner has alleged that Indiana's predominant practice requirement excludes him from the practice of law in the State in a manner inconsistent with the Equal Protection Clause. At the minimum level of equal protection analysis, legislation which classifies persons must do so in a manner rationally related to legitimate governmental objectives. *Schweiker v. Wilson*, 450 U.S. 221, 230, 67 L.Ed.2d 186, 101 S.Ct. 1074, 1080-81 (1981). Rule 6 by its terms separates active attorneys with out-of-state licenses into two categories: those who practice predominantly in Indiana and those who do not. By interpretation of Respondent State Board of Law Examiners, this classification of Rule 6 separates those who spend most of their professional time on matters pertaining to Indiana law, Indiana court proceedings, **or** Indiana clients, from those who spend most of their professional time on matters pertaining to the law, courts, **and** clients of another jurisdiction.

The only reason for the predominant practice requirement suggested by the Court of Appeals and the District Court is to ensure that attorneys practicing in the Indiana courts are familiar with state law. (App. 7, 38 F.3d at 924; App. 33, 852 F.Supp. at 715). While this reason **does** constitute a legitimate governmental objective, the predominant practice requirement does not rationally serve that objective. There is simply nothing about being **less** familiar with another state's law which tends to make one **more** familiar with the law of the licensing

state. Further, there is no legitimate state interest in regulating the conduct of business in other states, as the present rule appears to do. See *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43, 73 L.Ed.2d 269, 102 S.Ct. 2629, 2640-41 (1982) (plurality opinion).

Petitioner does not contest that requiring a certain amount of experience in handling Indiana law or court matters for a limited period of time is one rational means of ensuring familiarity in handling Indiana law or court matters. To that end, Petitioner has not objected to that part of Rule 6 which requires the applicant to practice "actively" in Indiana. The problem with Rule 6 is that it does not merely specify in absolute terms a quantum of such experience, but defines the requisite amount of experience **relative** to the attorney's experience outside the state: the applicant must practice not only actively in Indiana, but **mostly** in Indiana.

To illustrate, an attorney who works 1000 hours per year entirely on Indiana law matters, may keep his Indiana license under Rule 6, presuming 1000 hours per year meets the "actively engaged" portion of the rule. However, a second attorney, if she works 3001 hours per year, but only 1500 of those on Indiana matters, could not keep an Indiana license even though the second attorney has worked half again as many hours **in Indiana** as the first attorney. Or, as stated by Chief Circuit Judge Posner below, if one lawyer bills Illinois clients for 900 hours of work a year and Indiana clients for the same number, while a second lawyer bills Illinois clients for 500 hours and Indiana clients for 800, only the second lawyer may gain admission without taking the Indiana bar despite his fewer hours with Indiana clients. (App. 40, 47 F.3d at

173-74, Posner, C.J., dissenting from denial of rehearing en banc.) If the aim is to guarantee a certain amount of experience in **Indiana** legal practices, it is not rational to add into the calculation a comparison to the amount of **non**-Indiana legal practices.

There is another aspect of the rule that also demonstrates its irrationality. The Respondent State Board of Law Examiners, in defining the term "in Indiana" in the predominant practice requirement of Rule 6, included "representing Indiana clients" as well as "handling cases in Indiana courts" and "dealing with Indiana law." By including the representation of Indiana residents as an alternative to the handling of matters involving Indiana law or courts, Defendants have only ensured that the predominant practice requirement does not even require that the major portion of the Rule 6 applicant's practice involves experience in Indiana law or court procedures. An admissions rule which permits compliance by attorneys who represent Indiana residents suing or being sued out of state or in federal court or Indiana residents needing legal advice on matters of law in other jurisdictions is plainly not designated to require familiarity with Indiana law and court procedures. See example cited by Chief Circuit Judge Posner, App. 42-43, 47 F.3d at 174-75 (Posner, C.J., dissenting from denial of rehearing en banc).

B. RELATIVE "COMMITMENT" TO ONE STATE OVER ANOTHER IS NOT A RATIONAL MEANS TO OBTAIN A LEGITIMATE STATE INTEREST.

The Court of Appeals reasoned that the predominant practice requirement rationally serves the goal of fostering attorney familiarity with the local law because, "[i]f

the largest portion of an attorney's practice is in one state, the attorney has a strong incentive to master the law of that state." (App. 9, 38 F.3d at 925, citing *Sestric v. Clark*, 765 F.2d 655, 661 (7th Cir. 1985).) In *Sestric*, the bar admission rule at issue was a residency requirement: while newly resident attorneys who were experienced in other states did not have to take a bar examination to gain admission in Illinois, equally experienced nonresidents did have to take the bar examination. 765 F.2d at 656-57. The Seventh Circuit's reasoning in support of the rationality of this residency requirement, to which it referred to in this case, was that residency constituted a "commitment" to Illinois and served as a valid substitute to the bar examination; the "focus of [the nonresident's] practice being elsewhere, his incentive to master Illinois law is less than that of a resident who expects to practice Illinois law full time." 765 F.2d at 661.

However, since *Sestric* was decided, this Court has repeatedly rejected the proposition that a "commitment" to a state such as residency or an in-state office logically serves the legitimate goal of fostering attorney familiarity with local law or court rules. See *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 69, 101 L.Ed.2d 56, 108 S.Ct. 2260, 2266 (1988), (seeing "no reason to assume that nonresident attorneys who, like Friedman, seek admission to the Virginia bar on motion will lack adequate incentives to remain abreast of changes in the law or to fulfill their civic duties"); *Frazier v. Heebe*, 482 U.S. 641, 649, 96 L.Ed.2d 557, 107 S.Ct. 2607, 2613 (1987), (holding that an in-state office "will not elevate [the attorney's] understanding of the local rules" and that the location of a lawyer's office "simply has nothing to do with his or her

intellectual ability or experience in litigating cases in Federal District Court"); *Barnard v. Thorstenn*, 489 U.S. 546, 556, 103 L.Ed.2d 559, 109 S.Ct. 1294, 1301 (1989), (observing that it was neither "realistic" nor "practical" to assume that nonresidents would fail to take steps necessary to keep informed of local law). While these cases were not decided under the Equal Protection Clause (*Fraiser* was decided under the Court's supervisory authority over the federal courts; *Friedman* and *Barnard* were decided under the Privileges and Immunities Clause), their reasoning totally undermines the position of the Seventh Circuit that familiarity with local law or court rules is reasonably enhanced by a requirement of an overt commitment to the state **distinct** from steps toward actually becoming familiar with local law or court rules.

C. THE COURT OF APPEALS DISREGARDED THIS COURT'S STANDARDS FOR RATIONAL BASIS REVIEW BY EVALUATING THE RATIONALITY OF RULE 6 AS A WHOLE RATHER THAN THE CLASSIFICATION AT ISSUE.

The subject claim that the predominant practice requirement violates the Equal Protection Clause is based on the contention that the line drawn by that particular requirement is not rational. That is, among that group of attorneys who **all** have out-of-state licenses and practice actively in Indiana, the line drawn between those who happen to practice mostly in Indiana and those who happen to practice mostly in a different state does not rationally serve the purported state purpose of fostering greater familiarity with Indiana law. In adjudging this

claim, the Court of Appeals looked beyond the classification at issue and evaluated the rationality of Rule 6 as a whole, asserting that this broader approach was required by rational basis review. (App. 8-10, 38 F.3d at 925.) In so doing, however, the Court of Appeals misstated the nature of such review as established by the decisions of this Court.

An essential part of equal protection analysis even under the rational basis standard is that all persons "similarly situated" or "similarly circumstanced" be treated alike. See, *e.g.*, *City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 439, 87 L.Ed.2d 313, 105 S.Ct. 3249, 3254 (1985); *Eisenstadt v. Baird*, 405 U.S. 438, 447, 31 L.Ed.2d 349, 92 S.Ct. 1029, 1034 (1972). Thus, it is the rationality of the **particular classification**, not the state's general approach to the subject matter, which is to be reviewed and that rationality is to be judged by comparison of the treatment of those "similarly situated" or "similarly circumstanced." The fact that Rule 6 as a whole rationally serves the goal of fostering familiarity with Indiana law for out-of-state attorneys without taking the bar exam is beside the point. Rule 6 rationally serves that legitimate state goal through the several requirements not challenged in the subject claim. Petitioner challenges only the rationality of the predominant practice requirement and **that** rationality can only properly be determined by comparing those who meet all of the requirements of Rule 6 **except** the predominant practice requirement to those who meet all of the requirements of Rule 6 **including** the predominant practice requirement, *i.e.* those "similarly situated." This the Court of Appeals did not do.

The error of the Court of Appeals' approach is clearly demonstrated by this Court's opinion in *Williams v. Vermont*, 472 U.S. 14, 86 L.Ed.2d 11, 105 S.Ct. 2465 (1985). There, Vermont imposed a use tax on cars registered in state, but granted an exemption for the amount paid to another state in sales or use tax if that state granted a similar credit for taxes paid in Vermont. However, this exemption was made available only to those who were Vermont residents at the time the other state's taxes were paid. The Court held, under rational basis review, that there was no legitimate purpose furthered by differentiating availability of the exemption based on a person's past residence. 472 U.S. at 23-24, 105 S.Ct. at 2471-72. One of the state's arguments in defense of the classification was that persons who were not residents at the time their car was purchased were no worse off than other persons who could not qualify for the exemption. The Court disposed of this argument as follows:

> "Yet the fact that all those not benefitted by the challenged exemption are treated equally has no bearing on the legitimacy of that classification in the first place. A State cannot deflect an equal protection challenge by observing that in light of the statutory classification all those within the burdened class are similarly situated. The classification must reflect pre-existing differences; it cannot create new ones that are supported by only their own bootstraps. 'The Equal Protection Clause requires more of a state law than nondiscriminatory application within the class it establishes.' *Rinaldi v. Yeager*, 384 U.S. 305, 308, 16 L.Ed.2d 577, 86 S.Ct. 1497, 1499 (1966)." 472 U.S. at 27, 105 S.Ct. at 2474.

Similarly here, the Court of Appeals attempted to ascertain the rationality of the predominant practice requirement by comparing those who meet all the requirements of Rule 6 to those who fail **any** one or more of those requirements, not necessarily the predominant practice requirement. But the latter group is not similarly situated to Petitioner: except for the predominant practice requirement, he **does** meet the Rule 6 requirements.

III. THE PREDOMINANT PRACTICE REQUIREMENT VIOLATES THE COMMERCE CLAUSE.

A. THE PREDOMINANT PRACTICE REQUIREMENT CONSTITUTES DIRECT REGULATION OF OR DISCRIMINATION AGAINST INTERSTATE COMMERCE.

Under the "dormant" Commerce Clause, the validity of a state regulation of commerce, in the absence of federal regulation, is to be measured by one of two distinct tests. One test applies when the state regulation "directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests"; these regulations are generally struck down. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 578-79, 90 L.Ed.2d 552, 106 S.Ct. 2080, 2084 (1986). More specifically, a statute that directly controls commerce occurring wholly outside the boundaries of a state exceeds the limits of the state's authority and is invalid regardless of whether the statute's extraterritorial reach was intended. *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 105 L.Ed.2d 275, 109 S.Ct. 2491, 2499 (1989). Further, a law which by its terms discriminates against commerce across state lines is

unconstitutional unless that discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *Healy*, 109 S.Ct. at 2501. The second test applies where the regulation "has only indirect effects on interstate commerce and regulates evenhandedly"; then, a court examines whether the State's interest is legitimate and whether the burden on interest commerce exceeds the local interests served. *Brown-Forman*, 476 U.S. at 578-79, 106 S.Ct. at 2084. The Court of Appeals relied upon the second (*i.e.*, balancing) test to uphold the predominate practice requirement. Petitioner submits that the Court of Appeals neglected this Court's standards both in how it decided to employ the balancing test and how it applied that test.

The predominant practice requirement is a state law which attempts to directly regulate and limit commerce defined only as occurring wholly outside Indiana. It requires that attorneys admitted to practice under Rule 6 practice as much or more in Indiana as in other states. The Court of Appeals itself acknowledged that this is the same as requiring that these attorneys **not** practice in other states more than they do in Indiana. (App. 12, 38 F.3d at 926, quoting from *K-S Pharmacies, Inc. v. American Home Products Corp.*, 962 F.2d 728, 730 (7th Cir. 1992), "Any statute of the form 'charge in this state the same price you charge outside it' carries the implied command: 'Charge outside this state the same price you charge inside it.' ") Just as a state cannot tell sellers to charge the same price within its borders as they charge in other states (*Healy; Brown-Forman*), Respondents cannot induce attorneys to limit their practice of law in other states in

order to practice more in Indiana. This exercise of extra-territorial power over the commerce of other states is *per se* unconstitutional.

This Court has previously addressed the permissibility under the Commerce Clause of a state scheme employing differential treatment of entities based on the relative amounts of their business conducted in-state and out-of-state. In *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 80 L.Ed.2d 388, 104 S.Ct. 1856 (1984), the State of New York imposed a franchise tax on the parent companies of Domestic International Sales Corporations (DICSs), corporations receiving favorable federal income tax treatment due to the fact that their assets and receipts are export-related. As part of the New York tax scheme, there was an offsetting tax credit for the parent companies. This tax credit was computed based, in part, on the relative amounts of the companies' in-state and out-of-state shipping activities. In holding that the tax credit scheme was unconstitutional, this Court observed the following with regard to how the tax credit was to be computed:

> "[It] has the effect of treating differently parent corporations that are similarly situated in all respects except for the percentage of their DISCs' shipping activities conducted from New York. This adjustment has the effect of allowing a parent a greater tax credit on its accumulated DISC income as its subsidiary DISC moves a greater percentage of its shipping activities into the State of New York. Conversely, the adjustment decreases the tax credit allowed to the parent for a given amount of its DISC's shipping activity conducted from New York as the DISC

> increases its shipping activities in other States. Thus, not only does the New York tax scheme 'provide a positive incentive for increased business activity in New York State,' Budget Report, at 18, **but also it penalizes increases in the DISC's shipping activities in other States.**" 466 U.S. at 400-01, 104 S.Ct. at 1863-65; emphasis added; footnote omitted.

Like the tax credit scheme in *Westinghouse*, the predominant practice requirement penalizes or burdens attorneys directly and expressly based upon the relative amount of their out-of-state business.

B. THE COURT OF APPEALS DISREGARDED THIS COURT'S PRECEDENTS IN WEIGHING THE BURDEN OF THE BAR EXAMINATION IN DECIDING TO APPLY THE COMMERCE CLAUSE BALANCING TEST.

The Court of Appeals first recognized the two-tiered Commerce Clause analysis and then acknowledged that the predominant practice requirement "clearly imposes differential burdens on attorneys practicing more out of state than in state." (App. 12, 38 F.3d at 926.) The Courts of Appeals then, however, engaged in a balancing of the burdens on interstate commerce **in order to** decide that there was no direct discrimination. This approach is totally inconsistent with the tests delineated by this Court because it ignores facial discrimination against out-of-state commerce and because it employs a balancing of the burdens to determine **which** Commerce Clause test to use rather than **as** one of the tests after the absence of direct discrimination is determined.

Again, the decision in *Westinghouse Electric Corp. v. Tully*, 466 U.S. 388, 80 L.Ed.2d 388, 104 S.Ct. 1856 (1984), is instructive. After determining that the state tax credit scheme based on the relative amount of a company's in-state and out-of-state business was facially discriminatory against interstate commerce, the Court rejected the State's argument that such discrimination was permissible where the burden on interstate commerce was insignificant, stating that "[w]hen a tax, on its face, is designed to have discriminatory economic effects, the Court 'need not know how unequal the Tax is before concluding that it unconstitutionally discriminates.' " 466 U.S. at 406-07, 104 S.Ct. at 1867, quoting *Maryland v. Louisiana*, 451 U.S. 725, 760, 68 L.Ed.2d 576, 101 S.Ct. 2114, 2136 (1981).

Unlike this Court's analysis in *Westinghouse*, however, the Court of Appeals here did not stop its inquiry into which test to apply when it noted the facial discrimination against interstate commerce. Instead, it **weighed** the burden of the bar examination option. (App. 13-17, 38 F.3d at 926-28.) First, the Court of Appeals pointed out that Petitioner "can obtain what he wants . . . **simply** by sitting for the bar examination" (App. 13, 38 F.3d at 926-27; emphasis added.) Of course, the companies in *Westinghouse* need "simply" have paid an additional amount of tax in order to continue doing business in New York. Direct discrimination against interstate commerce is invalid no matter how slight the added cost.

The Court of Appeals then stated that attorneys with predominantly out-of-state practices are not discriminated against as compared to "the vast majority of Indiana attorneys" who do not have out-of-state licenses and who,

therefore, must take the exam. (App. 13, 38 F.3d at 927.) However, as the Court of Appeals itself pointed out (App. 15, 38 F.3d at 927), they **are** discriminated against in relation to those attorneys, whatever their number, who are experienced attorneys with out-of-state licenses but who will now practice mostly in Indiana. As with equal protection, the presence of discriminatory treatment cannot be disregarded by the simple expedient of finding a different group against which to compare the disfavored one.

Finally, the Court of Appeals relied on its conclusion that the predominant practice requirement will have a *de minimis* effect on interstate commerce because it will not induce many attorneys to give up out-of-state practices in order to avoid taking the bar examination. (App. 14, 38 F.3d at 927.) But, as the *Westinghouse* case demonstrates, the degree of burden on interstate commerce is not part of the Commerce Clause equation **unless** a court finds that there is no direct discrimination; the supposedly slight impact on commerce cannot be used to do away with the strict Commerce Clause test despite the presence of direct discrimination. 466 U.S. at 405-07, 104 S.Ct. 1867-68. Just as this Court in *Westinghouse* did not address, once direct discrimination against interstate commerce was noted, how many companies might shift their shipping activities between states, the Court of Appeals below should not have considered whether the extraterritorial impact of the predominant practice requirement was "speculative at best" and "incidental" (App. 17, 38 F.3d at 928), once it observed that the requirement "clearly imposes differential burdens on attorneys practicing more out of state than in state" (App. 12, 38 F.3d at 926).

C. EVEN UNDER THE COMMERCE CLAUSE BALANCING TEST, THE PREDOMINANT PRACTICE REQUIREMENT FAILS BECAUSE IT SERVES NO LEGITIMATE STATE INTEREST.

After determining that the Commerce Clause balancing test was the correct one to apply to Petitioner's claim, the Court of Appeals wasted little effort in finding that the scales tipped in favor of validating the predominant practice requirement because of "the legitimacy of the state's interest in regulating the legal profession." (App. 17, 38 F.3d at 928.) In so holding, the Court of Appeals again misapplied this Court's standards.

The balancing test was articulated as follows in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 25 L.Ed.2d 174, 90 S.Ct. 844, 847 (1970):

> "When the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Here, the Court of Appeals did not even examine what the "putative local benefits" of the predominant practice requirement were; it only cited the state's interest in "regulating the legal profession." However, as discussed in Part II above, the legitimate state interest in fostering attorney familiarity with state law is not "effectuated" by the predominant practice requirement. What local benefit is there in inducing an attorney to reduce or restrain the growth in his or her practice in another state?

The *Pike* decision recognized that even a slight and indirect effect on interstate commerce should not be permitted where a state's interest is insubstantial. 397 U.S. at 146, 90 S.Ct. at 849. Here, where the proffered legitimate state interest (encouraging attorneys to become more knowledgeable about state law) is not served by the rule and where the interest which is served by the rule (regulation of the amount of business conducted in another state) is not legitimate (see *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43, 73 L.Ed.2d 269, 102 S.Ct. 2629, 2641 (1982) (plurality opinion); *Brown-Forman*, 476 U.S. at 585, 106 S.Ct. 2087), the scales must tip against the rule. As Chief Circuit Judge Posner stated: "The rule flunks the laxest sort of balancing test." (App. 43, 47 F.2d at 175, Posner, C.J., dissenting from denial of rehearing en banc.)

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-1783

ANTHONY G. SCARIANO,

Plaintiff-Appellant,

v.

JUSTICES OF THE SUPREME COURT
OF THE STATE OF INDIANA
and MEMBERS OF THE
STATE BOARD OF LAW
EXAMINERS OF THE
STATE OF INDIANA,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division. No. 93 C 606 –
Sarah Evans Barker, *Chief Judge.*

ARGUED SEPTEMBER 7, 1994 – DECIDED OCTOBER 26, 1994

Before CUMMINGS, BAUER and CUDAHY, *Circuit Judges.*

CUDAHY, *Circuit Judge.* The Supreme Court of Indiana exempts out-of-state practitioners from the bar examination only if they practice "predominately" in Indiana for a period of five years. Anthony G. Scariano, an attorney practicing in Illinois, asserts that this rule violates the Equal Protection Clause of the Fourteenth Amendment

and the Commerce Clause of Article I of the Constitution. The district court dismissed Scariano's complaint for failure to state a claim upon which relief could be granted. Chief Judge Barker held that the indirect consequences of Indiana's rule did not rise to the level of an Equal Protection Clause violation or a violation of the Commerce Clause.[1] We affirm.

I.

Anthony G. Scariano has practiced law in Illinois since 1975. He maintains an office and an active practice in Chicago Heights, Illinois, only a few miles from the Illinois-Indiana border.

In 1990, Scariano applied for admission to the Indiana Bar under that state's foreign license provision, Rule 6 of the Indiana Rules for Admission to the Bar and the Discipline of Attorneys (Rules).[2] An applicant can gain

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[1] In the lower court, Scariano also asserted a right to travel claim and challenged the rule as applied. Because he does not challenge the district court's rulings on these issues on appeal, we will not discuss them.

[2] The relevant text of Rule 6 provides:

> (1) A person who has been admitted to practice law in the highest court of law in any other state . . . may be conditionally admitted to practice law in Indiana upon a finding by the State Board of Law Examiners that said person has met each of the following conditions:
>
> (a) The applicant has actively engaged in the practice of law for a period of at least five (5) of the seven (7) years immediately preceding the date of the application. "Engaged in the practice of law" shall mean:

conditional admission to the Indiana Bar under this provision by submitting an affidavit of intent to engage in practice predominately in Indiana. Scariano obtained a conditional license on March 4, 1991.

Renewal of this conditional admission depends upon the applicant's ability to demonstrate an active practice, predominately in Indiana, on a yearly basis. If the applicant succeeds in demonstrating such an active practice for a period of five years, he or she is admitted to the Indiana Bar.

Indiana's Board of Law Examiners interprets and applies Indiana's Rules. That body recently interpreted the "predominant practice requirement" of Rule 6(3).[3] The Board stated that:

> (i) regularly performing legal services for the general public as a lawyer. . . .
>
> . . . .
>
> (g) The applicant has filed along with the application an affidavit of the applicant's intent to engage actively and predominately in the practice of law in Indiana.
>
> (3) Said conditional admission on a foreign license may continue in force for one year, and may be renewed for a like period upon the submission of such verified individualized information as will demonstrate to the satisfaction of the Board that the applicant has during the past year been both (a) actively engaged in the practice of law, and (b) predominately in Indiana. . . . Upon the fifth consecutive renewal granted to the applicant, the admission to practice shall be permanent.

[3] The Rules use the word "predominately." The Board, however, defined the term "predominantly." The district court adopted the term "predominant practice requirement" to refer to both words used by the State of Indiana. We do likewise on appeal.

> The term "in Indiana" means dealing with Indiana law, representing Indiana clients, or handling cases in Indiana courts, *i.e.*, the applicant must look to the substance of what he or she is doing in the practice that relates to Indiana law, courts and clients rather than the physical location of his office.
>
> The term "predominantly" means that the individual's practice in Indiana must exceed, or be equal to, his or her practice in any other jurisdiction.

The application of this requirement prevented Scariano from renewing his conditional license to practice law in Indiana. Because he had a substantial practice in Illinois, it was impossible for him to provide proof of an Indiana practice that exceeded or equaled that of Illinois.

Scariano now attempts to challenge the predominant practice requirement. Although Indiana's Rules provide him the alternative means of gaining admission through bar examination, he undertakes an attack on Indiana's foreign practice provision, Rule 6. He characterizes Indiana's demand that he take the bar examination – when others with out-of-state practices are exempt – as an unreasonable burden. The district court found otherwise. We affirm.

II.

State courts have traditional authority to control bar admission. *Leis v. Flynt*, 439 U.S. 438, 444 n.5 (1979). A state can therefore require observance of high standards, such as proficiency in the law, before admitting an applicant to the bar. *Schware v. Board of Bar Examiners of New*

Mexico, 353 U.S. 232, 239 (1957). A state's discretion is not, however, unfettered. State bar admission requirements must have a rational connection with an applicant's legal ability, and they must fulfill other constitutional mandates. *Id. See also Poats v. Given*, 651 F.2d 495 (7th Cir. 1981) (upholding Indiana's exclusion of applicants who had previously failed the bar examination four times).

The Admission Rules are an exercise of the Indiana Supreme Court's rule-making authority. For the purposes of constitutional inquiry, courts treat the Rules as legislation. *See, e.g., Salibra v. Supreme Court of Ohio*, 730 F.2d 1059, 1062 n.5 (6th Cir. 1984), *cert. denied*, 469 U.S. 917 (1984). Analysis of Indiana's Rule 6 must therefore proceed under equal protection and commerce clause standards. Our review of such matters is *de novo. Harris Trust & Savings Bank v. E-II Holdings, Inc.*, 926 F.2d 636, 641 n.17 (7th Cir. 1991).

III.

Scariano first asserts that Rule 6 violates the Equal Protection Clause. The predominant practice requirement, he claims, draws an arbitrary distinction between classes of out-of-state practitioners by focusing on the relative sizes of their out-of-state practices.[4] Because a

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[4] We use the term "out-of-state practitioners" throughout this opinion to refer to attorneys licensed to practice law in states other than Indiana. The term has nothing to do with an attorney's residence; nor does the term suggest that an attorney has not yet practiced in Indiana on a conditional basis.

state need not tailor classifications perfectly when fundamental rights are not implicated, we cannot accept Scariano's equal protection challenge.

The first step in equal protection analysis is to determine the standard of scrutiny to which Indiana's Rules are subject. The right to practice law without taking a bar examination is not a fundamental right for equal protection purposes. *Lowrie v. Goldenhersh*, 716 F.2d 401, 412 (7th Cir. 1983). Given the absence of both a fundamental right and a suspect class, rational basis review applies. *Schumacher v. Nix*, 965 F.2d 1262, 1266 (3d Cir. 1992). Other courts considering equal protection challenges to state bar rules have consistently applied rational basis review. *Id.* at 1268 (citing cases). Therefore, we will assess the validity of Rule 6 under rationality review.

Under the rational basis test, a law is entitled to a presumption of validity. *Parnham v. Hughes*, 441 U.S. 347, 351 (1979). A court will not disturb the law as long as it is rationally related to a legitimate government interest. *Schumacher*, 965 F.2d at 1269. Therefore, Indiana need make only two showings. First, the State must point to a legitimate state interest. Second, it must demonstrate Rule 6's rational relation to that interest.

States unquestionably have a legitimate interest in insuring the competence of attorneys practicing within their borders. *Sestric v. Clark*, 765 F.2d 655, 663 (7th Cir. 1985); *Lowrie*, 716 F.2d at 408. Given the information barriers that many clients face in choosing attorneys, a state's desire to regulate the profession is understandable. *Sestric*, 765 F.2d at 663 (quoting *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977)). For these reasons,

courts treat state efforts to preserve professional integrity with deference. *Schumacher,* 965 F.2d at 1269.

The district court found that Rule 6 purports to serve two interests. First, Rule 6 is designed to "force familiarity with Indiana law." Second, the rule seeks to maintain "the quality of those persons admitted to practice law." We have previously identified these interests as legitimate; Scariano does not derogate their importance.

Instead, Scariano attacks Rule 6(3)'s claimed rationality. The requirement that an attorney licensed out-of-state practice predominately in Indiana (that is, more than the attorney practices in other states) is not, he asserts, rational. The comparison between practice in Indiana and practice elsewhere is purportedly not probative of an attorney's familiarity with Indiana law. Instead, the State should require a fixed quantum of experience with Indiana law. By requiring a given measure of experience in Indiana law, Indiana can avoid a disparity in knowledge among out-of-state practitioners gaining admission.

The claimed flaw in the required *comparative* assessment arises from the possible admission of an attorney only marginally familiar with Indiana law. This might occur, it is claimed, because such an attorney might have a relatively small out-of-state practice. An attorney more experienced in Indiana law, on the other hand, might be denied admission due to a larger out-of-state practice (as apparently happened with Scariano himself). The present rule thus fails to guard against inequalities in admission. Attorneys less well-versed in Indiana's particularities might gain admission while those knowing more about

Indiana law might be required to take the bar examination. Although these may indeed be dangers, they do not signal the demise of Rule 6 under rational basis review.

Rationality does not require that a rule be the least restrictive means of achieving a permissible end. *Lowrie*, 716 F.2d at 401; *Schumacher*, 965 F.2d at 1273. The general wisdom of Indiana's approach is not a matter for this Court's scrutiny. A given bar admission rule need not be the most effective means of regulating bar admission. *Lowrie*, 716 F.2d at 401. Scariano's complaints about the required comparative assessment are thus wide of the constitutional mark.[5] Nor is it relevant that some unfairness results from the application of the rule. *Schumacher*, 965 F.2d at 1273. Scariano may in fact be more qualified than others (with smaller out-of-state practices) who have gained admission under the predominant practice requirement. This circumstance, however, is not dispositive. Under rational basis review, some slippage is permissible.

Scariano, however, insists. He suggests that we can find irrationality if we confine our focus to the predominant practice requirement and ignore the rest of Rule 6. We cannot accept Scariano's suggestion. To do so would import least restrictive means analysis into rationality

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[5] Scariano also complains of a related matter: The Indiana practice requirement is satisfied simply by the representation of Indiana clients – a matter plausibly having little to do with an attorney's familiarity with Indiana law. This matter, like the comparative assessment complaint, is little more than circumspection inappropriate for rational basis review.

review by artificially analyzing Rule 6's various components.

This approach is unnecessarily narrow. Under it, we would have to focus on licensed attorneys with large out-of-state practices to find unfairness. Rule 6's scope is, however, broader. The rule applies to *all* out-of-state practitioners seeking admission without bar passage. In many applications, the rule will work as intended: out-of-state practitioners seeking admission will become adequately familiar with Indiana law before being admitted to the state bar. If the largest portion of an attorney's practice is in one state, that attorney has a strong incentive to master the law of that state. *Sestric*, 765 F.2d at 661. Such will be the case, more often than not, in Indiana. We cannot ignore this result in favor of a narrow approach that focuses only on the possible inequities of the predominant practice requirement. Courts evaluating bar rules may not proceed by such narrow inquiries. *See Schumacher*, 965 F.2d at 1272 (refusing to focus on the irrational instance of a reciprocity rule as applied to graduates of unaccredited law schools and focusing instead on the rule's application to all graduates).

As we have suggested, a different approach would import a least restrictive means analysis into rational basis review. Scariano is essentially arguing that Rule 6 could accomplish its goal of familiarity more effectively – by eliminating the predominant practice requirement's comparative assessment. Indiana, however, fashioned a rule that substitutes practical experience for the academic showing required by the bar exam. As noted by the district court, this rule accomplishes its goal of familiarity

with state law. Taking Rule 6 apart for piecemeal assessment avoids the very point of a rational basis inquiry. Scrutinizing the various components of a given rule is tantamount to demanding universal effectiveness or mathematical exactitude. This heightened approach is impermissible.

Indiana identified a legitimate state interest in its desire to regulate bar admission. Rule 6 provides a rational mechanism for attaining that goal. In light of the deference accorded under rational basis review, we cannot say that Rule 6 violates the Equal Protection Clause.

IV.

Scariano also asserts a Commerce Clause challenge. He claims that the predominant practice requirement discriminates against interstate commerce. By tying bar admission to varying levels of a practitioner's out-of-state practice, Indiana allegedly manipulates the amount of that out-of-state practice. Because we believe any discriminatory effects are mitigated by offering the bar exam as an alternative means of admission, we find that Rule 6 does not offend the Commerce Clause.

Two tests govern the validity of state law under the dormant Commerce Clause. *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267, 1276 (7th Cir. 1992). One test applies when the state regulation is facially neutral and has only an indirect effect on out-of-state commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Under the *Pike* test, a state regulation will be upheld unless the burden imposed is "clearly excessive in relation to the putative local benefits." 397 U.S. at 142. A

second test applies when the state regulation is discriminatory, either facially or in practical effect. *Brown-Forman Distillers Corp. v. New York Liquor Authority*, 476 U.S. 573, 579 (1985); *Government Suppliers*, 975 F.2d at 1277. The second test requires that the discrimination be justified by reasons unrelated to economic protectionism. *Government Suppliers*, 975 F.2d at 1277. Application of the second "test" almost invariably results in a state statute's invalidation. *Brown-Forman*, 476 U.S. at 579.

Given that the two tests produce such disparate results, a great deal turns on the determination of which test is to apply. This, naturally, the parties dispute. Both the district court and Indiana's Board believe the rule should be upheld under the *Pike* balancing test. Scariano, on the other hand, maintains that Rule 6 overtly discriminates.

Rule 6's predominant practice requirement insists that a practitioner's in-state practice be greater than his out-of-state practice to gain admission to Indiana's Bar; otherwise, the out-of-state practitioner must sit for the bar exam. Scariano believes that this arrangement invariably results in a limitation on an attorney's out-of-state practice: would-be Indiana attorneys will give up lucrative multistate practices rather than take the bar exam. Such, in Scariano's view, is the very essence of the extraterritorial reach condemned in *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 336 (1988). Further, the predominant practice requirement allegedly fails to regulate evenhandedly: given the class of out-of-state practitioners, those with substantial multistate practices are made to take the bar exam while those practicing predominantly in Indiana waive in, freed from exam headaches. Such disparate

treatment allegedly imposes an unreasonable burden on some out-of-state practitioners.

Scariano's claims have some appeal. Only by diminishing an out-of-state practice can an attorney take advantage of Indiana's predominant practice requirement. Rule 6 thus plausibly threatens reverberations beyond Indiana's borders. The rule also clearly imposes differential burdens on attorneys practicing more out of state than in state: only the out-of-state group is asked to take the bar exam. None of the cases relied upon by the Indiana Board analyze an admission rule that requires a similar comparative assessment or accords different treatment based on the level of out-of-sate practice.[6] These arguments thus might seem compelling under the Commerce Clause. *See, e.g., K-S Pharmacies Inc. v. American Home Products Corp.*, 962 F.2d 728, 730 (7th Cir. 1992) (noting that "[a]ny statute of the form 'charge in this state the same price you charge outside of it' carries the implied command: 'Charge outside this state the same price you charge inside it' ").

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[6] Although the Fourth Circuit upheld a similar rule in *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859 (4th Cir. 1985), Virginia's requirements are less stringent and the rule is not apparently enforced. The Virginia rule grants admission without examination to applicants who intend "to practice full-time" in Virginia. 766 F.2d at 860-61. This rule, however, is interpreted to require only that an applicant open a law office in Virginia and engage regularly in practice there. *In Re Brown*, 191 S.E.2d 812, 815 n.3 (Va. 1972). Further, Virginia has no enforcement mechanism to monitor compliance with the full-time practice requirement. *Friedman v. Supreme Court of Virginia*, 822 F.2d 423, 429 (4th Cir.), *aff'd*, 487 U.S. 59 (1988).

The existence of an alternative means of bar admission is fatal to Scariano's claim, however. Scariano can obtain what he wants – in addition to maintaining his lucrative out-of-state practice – simply by sitting for the bar examination. Viewed against the backdrop of a requirement that the great mass of practicing attorneys are obliged to suffer, his allegations of discrimination and extraterritorial effect lose force. The claimed extraterritorial effects disappear any time an out-of-state practitioner chooses to gain admission by sitting for the bar exam. The requirement that an applicant sit for the bar exam can hardly be deemed discriminatory when the vast majority of Indiana attorneys have taken that exam. In the past, this Court has found the exam alternative significant under the Commerce Clause. *See Sestric*, 765 F.2d at 658-62. That factor is still relevant here.[7]

Rule 6's alleged extraterritorial effects are hardly certain. One might guess that attorneys with lucrative out-of-state practices will give up those practices rather than sit for Indiana's bar exam. But this is pure speculation.

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[7] Scariano suggests that *Sestric* is of dubious weight after the Supreme Court's ruling in *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988). In *Friedman*, the Supreme Court invalidated a residency requirement parallel to that upheld in *Sestric*. We do not, however, rely on *Sestric's* commentary about the validity *vel non* of residency requirements. The present case has nothing to do with state residency; it instead involves a practice requirement – something that has a much more tenable connection to familiarity with a state's law (and poses no threat to the Privileges and Immunities Clause). We look to *Sestric* to determine the import of an alternative means of bar admission under Commerce Clause analysis. The Supreme Court did not tackle this particular issue in *Friedman*.

We have previously refused to attach significance to speculative claims of what *might* happen under a given bar admission rule. In *Sestric*, we noted that it was "a matter of conjecture whether the requirement of taking and passing a bar exam would actually exclude many lawyers having a serious desire" to practice in a given state. 765 F.2d at 659. The same considerations are dispositive here.

It is not entirely clear that the specter of the bar exam is sufficient to frighten an attorney away from a financially satisfying out-of-state practice. More likely than not, Indiana adopted the provision with a view to convenience. Those out-of-state practitioners contemplating relocation to Indiana (for whatever reason) now have a mechanism to ease their transition to that State. Claims that Indiana intended to induce attorneys into giving up multistate practices in favor of setting up shop within the state are without merit given the alternative of the bar exam. *See Lowrie*, 716 F.2d at 414. At most, Rule 6 might have some effect at the margin: those attorneys who, after a year under conditional admission, have Indiana practices approaching the size of practices out-of-state *might* be influenced by the promise of avoiding the bar exam. But this effect – if any – is *de minimis*.

Allegations of discrimination also fail in the face of a universal bar exam requirement. Indiana abides by the default rule that those wishing to practice within its borders must pass its bar exam. The State makes an exception to this universal rule for out-of-state practitioners whose practices shift predominately to Indiana. Essentially, Indiana has decided to confer a "benefit" on this particular group of out-of-state practitioners. That State also decided, however, to exclude Scariano from the

group receiving the benefit. Scariano claims that the decision to make him sit for the bar exam imposes a "burden" upon him. Yet the only way to imagine a "burden" is by ignoring the vast remainder of Indiana's attorneys; they must suffer this bar exam as well.

Indiana does treat Scariano *differently* from the group of out-of-state practitioners happening to have a predominant Indiana practice. Whether we characterize this treatment as a "benefit" to those out-of-state practitioners or a "burden" on Scariano is immaterial. Because Indiana accords Scariano treatment *equal* to that which it accords to the vast majority of attorneys wishing to practice within its borders, no discrimination can be said to exist.[8] *See Government Suppliers*, 975 F.2d at 1279 (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351 (1977)) ("Discrimination may take the form of 'raising the costs of doing business' for out-of-state entities, 'while leaving those of their in-state counterparts unaffected.' ").

Notice that we do not suggest that Indiana has carte blanche to regulate merely because it could require the bar exam from everyone if it chose. Courts have found such reasoning persuasive in the past. *See, e.g., Shapiro v. Cooke*, 552 F. Supp. 581, 588 (N.D.N.Y. 1982). There is also some authority suggesting that reasoning like this is

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[8] Scariano might still complain about being asked to take two bar exams – one more than the average practitioner who stays in his home state. This claim is invalid for the reason that Scariano, unlike the average stay-at-home practitioner, wishes to practice in two states. "It is not obviously unreasonable to make him take a second bar exam." *Sestric*, 765 F.2d at 660.

unobjectionable in the context of the Commerce Clause despite being problematic in other constitutional frameworks. *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859, 864 (4th Cir. 1985) (distinguishing the Commerce Clause from the Equal Protection Clause and "includ[ing] the examination alternative in our Commerce Clause calculus although ignor[ing] it for equal protection purposes"). Our brush strokes are not quite so broad. We hold only that claims of discrimination and extraterritorial effect must be assessed in light of the circumstances from which they arise. This formulation is not foreign to Commerce Clause analysis, where "the critical consideration is the overall effect of the statute. . . . " *Brown-Forman*, 476 U.S. at 579.

We cannot analyze the predominant practice requirement in a vacuum. The claimed extratteritorial effect is neither certain nor probable in the instant case. The cases upon which Scariano relies, however, all deal with statutes having a profound and inevitable effect. *Brown-Forman*, 476 U.S. at 580, and *Healy*, 491 U.S. at 337-39, both struck down liquor price affirmation statutes requiring sellers to affirm that prices within the state were no higher than prices outside it. The operation of the statutes could not be avoided if one wanted to sell liquor within the respective states; an extraterritorial impact was thus inevitable. Similarly, in *Government Suppliers*, 975 F.2d at 1279, a backhaul ban on municipal waste invariably increase the cost of importing that waste; refraining from backhauling was the only means of avoiding this increased cost.

The present case is distinguishable. The existence of the exam alternative renders the alleged extraterritorial

reach of the predominant practice requirement speculative at best. Requiring an out-of-state practitioner to take the bar exam most assuredly imposes a cost on that practitioner; but it is a cost borne by the majority of Indiana lawyers. The fact that nearly everyone – particularly state residents with a political voice – labors under the same yoke negates any claims of discrimination.

Because we find that Indiana's Rule 6 has only an incidental effect on interstate commerce, *Pike's* balancing test applies. *Hass v. Oregon State Bar,* 883 F.2d 1453, 1462 (9th Cir. 1989). Rule 6 thus survives unless Scariano can demonstrate that the "burden is clearly excessive in relation to the putative local benefits" of the rule. *Pike,* 397 U.S. at 142. We have previously noted the legitimacy of the state's interest in regulating the legal profession. *Sestric,* 765 F.2d at 664. The strength of that interest hardly changes for the purposes of Commerce Clause analysis. *See Goldfarb,* 766 F.2d at 865. The requirement that a practitioner wishing to practice in two states take the bar exam in both states is not excessive in light of the state's interest in regulating the profession.

V.

Indiana has chosen to waive the bar exam requirement for a certain class of out-of-state practitioners. Scariano takes exception to the manner in which that class is defined. Yet the means Indiana has chosen to insure familiarity with its law are not so egregious as to offend the Constitution. Given the need to maintain the quality of the legal profession, a judgment that practicing predominantly in Indiana more often than not insures the

desired level of familiarity with state law is not unreasonable.

For these reasons, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ANTHONY G. SCARIANO, Plaintiff,	)	
vs.	)	Cause No. IP 93-606-C
JUSTICES OF THE SUPREME COURT OF THE STATE OF INDIANA; and MEMBERS OF THE STATE BOARD OF LAW EXAMINERS OF THE STATE OF INDIANA, Defendants.	)	

ENTRY GRANTING MOTION TO DISMISS AND DIRECTING ENTRY OF JUDGMENT

Introduction

States have a constitutionally permissible and substantial interest in regulating bar admission. *In re Griffiths*, 413 U.S. 717, 723 (1973). The Supreme Court has recognized "the traditional authority of state courts to control who may be admitted to practice before them," *Leis v. Flynt*, 439 U.S. 438, 444 n.5 (1979) and "their broad power to establish standards for licensing practitioners and regulating the practice of professions," *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). They may do so, however, only so long as they "have a rational connection with the applicant's fitness or capacity to practice law." *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 239 (1957).

This case pits a challenge to an Indiana rule concerning bar admission against the State's interest in regulating and setting standards for admission. The challenger, Mr. Scariano, cannot prevail in the circumstances presented here and hence his action must be dismissed.

The Complaint

Anthony Scariano was admitted to practice law in the State of Illinois on April 30, 1975 and has been actively engaged in the practice of law since that time. He has also been admitted to practice before other courts, including the United States Supreme Court. His office is in Chicago Heights, Illinois, only a few miles from the Illinois-Indiana border.

On March 4, 1991 Scariano was conditionally admitted to practice law in Indiana based on his Illinois license. He later sought renewal of his conditional admission. In a letter dated November 10, 1992 the State Board of Law Examiners ("the Board") informed Scariano that his conditional license to practice law in Indiana was not renewed because of his failure to demonstrate that he "practiced predominantly in Indiana during 1991. . . . " (Exhibit B to the Complaint).[1]

Scariano now challenges Rule 6(3) of the *Indiana Supreme Court Rules for Admission to the Bar and the discipline of Attorneys ("Admission Rules")* and its interpretation by Indiana authorities. He contends that the Rule, on

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[1] Documents attached to the complaint are considered a part thereof. *Fed. R. Civ. P.* 10(c); *Hamilton v. O'Leary*, 976 F.2d 341, 343 (7th Cir. 1992).

its face and as applied, violates the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause of Article I of the Constitution. He also blends into each of these arguments the suggestion that Rule 6(3) unreasonably restricts his ability to travel. The action is brought pursuant to 42 U.S.C. § 1983 and jurisdiction is asserted to exist pursuant to 28 U.S.C. §§ 1331 and 1343.

Discussion

A. Indiana Admission Rule 6

"In Indiana, the Supreme Court has exclusive jurisdiction to admit attorneys to practice law." *Poats v. Givan*, 651 F.2d 495, 496 (7th Cir. 1981), citing Admission Rule 3. The current version of the *Admission Rules* provides that a person may be admitted to practice in the courts of Indiana by taking and passing the Indiana Bar Examination. There is an alternative procedure, established through Rule 6, whereby a person may be conditionally admitted based on his or her license to practice law in another state if he or she meets several requirements.[2]

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[2] The version of Rule 6 of these *Rules*, which became effective January 1, 1990 and which is challenged in this case, provides:

> (1) a person who has been admitted to practice law in the highest court of law in any other state . . . may be conditionally admitted to practice law in Indiana upon a finding by the State Board of Law Examiners that said person has met each of the following conditions:
>
> > (a) The applicant has actively engaged in the practice of law for a period of at least five (5) of the seven (7) years immediately preceding the

One of these is that the applicant for conditional admission submit "an affidavit of the applicant's intent to engage actively and predominately in the practice of law in Indiana." Admission Rule 6(1)(g). An attorney admitted on this basis may seek renewal of his or her conditional admission each year for up to five (5) consecutive years and will be granted renewal "upon the submission of such verified individualized information as will demonstrate to the satisfaction of the Board that the applicant has during the past year been both (a) actively engaged in the practice of law, and (b) predominately [sic] in Indiana." Admission Rule 6(3).

The Board interprets and applies the *Rules*. At the time Scariano was first conditionally admitted to practice

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> date of application. "Engaged in the practice of law" shall mean:
>
> (i) regularly performing legal services for the general public as a lawyer. . . .
>
> . . . .
>
> (g) The applicant has filed along with the application an affidavit of the applicant's intent to engage actively and predominately in the practice of law in Indiana.
>
> (3) Said conditional admission on a foreign license may continue in force for one year, and may be renewed for a like period upon the submission of such verified individualized information as will demonstrate to the satisfaction of the Board that the applicant has during the past year been both (a) actively engaged in the practice of law, and (b) predominately in Indiana. . . . Upon the fifth consecutive renewal granted to the applicant, the admission to practice shall be permanent.

law in Indiana, the Board's interpretation of the predominant practice requirement was imprecise, but was represented to the plaintiff as *not* requiring that the applicant/admittee spend more than 50 percent of his or her professional time in Indiana or more than 50 percent of his or her professional time on matters pertaining to Indiana law or pending in Indiana courts. On April 23, 1992 the Board defined two key terms used in Rule 6 in the following manner:

> The term "in Indiana" means dealing with Indiana law, representing Indiana clients, or handling cases in Indiana courts, *i.e.*, the applicant must look to the substance of what he or she is doing in the practice that relates to Indiana law courts and clients rather than the physical location of his office.
>
> The term "predominantly" means that the individual's practice in Indiana must exceed, or be equal to, his or her practice in any other jurisdiction.[3]

The Board's adoption and application of these definitions rendered the plaintiff ineligible for the renewal of his conditional license to practice law in Indiana.

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[3] The Supreme Court used the word "predominately." The Board defined the word "predominantly." Although the two terms are not synonymous, for the purpose of this Entry they are used together to create what is termed "the predominant practice requirement." This is consistent with the usage the parties have given to the two terms.

B. Standard of Review

The facts recited in this Entry have been drawn directly from the complaint and are assumed to be true for the purpose of ruling on the defendants' motion. *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985) (when ruling on a motion to dismiss, the court will "take the allegations in the complaint to be true and view them, along with the reasonable inferences to be drawn from them, in the light most favorable to the plaintiff"). Dismissal is proper only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the relief requested. *Illinois Health Care Ass'n v. Illinois Dept. of Public Health*, 879 F.2d 286, 288 (7th Cir. 1989).

Additional facts, not in the complaint, have been submitted and considered in connection with the Court's Entry of November 10, 1993. However, those materials relate to the issue of subject matter jurisdiction over some or all of the plaintiff's claims and hence have not caused the resolution of that issue to be considered under the standard for summary judgment prescribed in Rule 56(c) of the *Federal Rules of Civil Procedure*. *Crawford v. United States*, 796 F.2d 924, 928-29 (7th Cir. 1986).

C. Rooker-Feldman

The plaintiff challenges Rule 6(3) "as applied." This means, one must assume, "as applied to him." It appeared in this sense, therefore, that the plaintiff was challenging the ruling of the Indiana Supreme Court on his particular application. A district court has no jurisdiction to review such a ruling, even when dressed up as a

civil rights suit. *Ritter v. Ross*, 992 F.2d 750 (7th Cir. 1993). To do so would to run headlong into the *Rooker-Feldman* doctrine, which " 'simply forbids federal district court appellate review of state court judgments in the guise of collateral attacks when no federal statute authorizes such review.' " *Id.*, 992 F.2d at 753, quoting James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack on Habeas Corpus/Direct Review Parity*, 92 Colum. L. Rev. 1997, 2008 n.46 (1992).[4] *See also Guess v. Board of Medical Examiners*, 967 F.2d 998, 1002-03 (4th Cir. 1992) (plaintiffs who lose in state court may not "recast their claims in federal court under the guise of federal constitutional claims that were not raised or decided by the state court . . . if the constitutional claims are inextricably intertwined with the merits of the state court judgment.").

Neither party initially addressed the relationship or applicability of Admission and Discipline Rule 14(3) in this situation. That Rule provides that a person aggrieved by the final action of the Board through a refusal to recommend the admission of an applicant to practice law in Indiana for any reason other than failure to pass the Bar Examination

> may, within twenty (20) days of receipt of notification setting forth the reason for refusal . . . file a petition with the Supreme Court of Indiana requesting review by this Court of such final determination, and setting forth [the basis for the Board's error].

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[4] The *Rooker-Feldman* doctrine takes its name from two major Supreme Court cases interpreting 28 U.S.C. § 1257, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

Upon receipt of such a petition the Board sends the matter to the Indiana Supreme Court for a final determination. Based on the availability of this procedure and uncertainty as to whether it had been followed, the Court directed the parties to address whether the *Rooker-Feldman* line would be impermissibly crossed by reaching the merits of the plaintiff's claims.[5] The supplemental materials supplied by the parties show that on November 13, 1992 the plaintiff wrote a letter to the Indiana Supreme Court Administrator which he described as an appeal, pursuant to Rule 14(3), of the revocation (actually the non-renewal) of his Indiana license. He was informed by return letter dated November 24, 1992 that the Supreme Court had considered his appeal and that the appeal "was denied 4-0, with Chief Justice Shepard not participating." The Board's Executive Director then wrote a letter dated January 27, 1993 explaining that the plaintiff needed to direct his appeal to the Indiana Supreme Court and that the Board considered its decision of November 10, 1992 its final action. This letter was somewhat misleading. The defendants have presented the following explanation of their procedure on pages 6-7 of their contentions filed November 29, 1993:

> 18. In answer to this Court's specific concerns regarding the proceedings before the Supreme Court of Indiana, Defendants state that this case

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[5] This is the sifting of the personal from the general to determine which claims state general, facial attacks on state law and which state claims attacking the specific applications of state law. *See e.g., Lowrie v. Goldenhersh*, 716 F.2d 401 (7th Cir. 1983); *Czura v. Supreme Court of South Carolina*, 632 F. Supp. 267 (D.S.C. 1986).

> was not formally docketed; that no briefing schedule was established, nor were briefs filed; and that the decision of the Court to deny relief to Mr. Scariano was made at a court conference on November 24, 1992.
>
> 19. The Supreme Court of Indiana represents that formal opening of a docket does not always occur under the review provisions of Admission and Discipline Rule 14(3) and that the Court does render decisions based upon the file of the Board of Law Examiners and letters such as submitted by Mr. Scariano. As a matter of further clarification, where the November 24, 1992 letter of Douglas Cressler, Assistant Administrator of the Supreme Court, makes reference to the "Petition" of Mr. Scariano, this refers to the letter of November 13, 1992 submitted by Mr. Scariano.

The decision of November 24, 1992 was thus the end of the road for Scariano insofar as Rule 14(3) was concerned.

The two-prong test of *Rooker-Feldman* asks first whether the appeal of the non-renewal of Scariano's Indiana license was a judicial proceeding, and second whether Scariano's claims are so inextricably intertwined with that proceedings as to make review of the claims an impermissible review of a state judicial proceeding. *Leaf v. Supreme Court of Wisconsin*, 979 F.2d F.2d 589, 597 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2417 (1993).

"A judicial proceeding . . . 'investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.' " *Leaf*, 979 F.2d at 596, quoting *Feldman*, 460 U.S. at 477. "A legislative proceeding, however, focuses on the future 'and

changes existing conditions by making a new rule to be applied thereafter." *Id.* Applying this test it is undeniable that Scariano's Rule 14(3) appeal was judicial in nature. *See Greening v. Moran,* 953 F.2d 301, 305 (7th Cir.), *cert. denied,* 113 S. Ct. 77 (1992) (attorney disciplinary proceeding before state supreme court is judicial in nature).

This Court also finds that the second prong of the test is present with respect to Scariano's personal challenge to Rule 6(3) *as applied.* While his claim before the Supreme Court was not elaborate and the decision by that body essentially unexplained, a decision on the application of the predominant practice requirement to him was made and that decision cannot be reviewed here. *See Asarco Inc. v. Kadish,* 590 U.S. 602, 622 (1989) (review by the district court of the Arizona Supreme Court ruling where "[that] action, in essence, would be an attempt to obtain direct review of [a state supreme court's] decision in the lower federal courts . . . would represent a partial inroad on *Rooker-Feldman's* construction of 28 U.S.C. § 1257").

The plaintiff disclaims any effort here to obtain the review which we have just demonstrated *Rooker-Feldman* prohibits. Certainly consideration of the specific relief requested will aid in determining what is being challenged and thus whether a district court has subject matter jurisdiction. *Centifanti v. Nix,* 865 F.2d 1422, 1429 (3rd Cir. 1989) (citing *Stern v. Nix,* 840 F.2d 208 (3d Cir.), *cert. denied,* 488 U.S. 826 (1988)). However, the complaint alleges that the plaintiff suffered economic damage as the result of the defendants' decision. He challenges the Rule and definitions pertaining to it "as applied." Even though he does not seek an injunction compelling the defendants

to issue the conditional license which they denied after adopting the definition of "predominantly" practicing in Indiana, these allegations are sufficiently specific to draw into question the validity of the decision made by them and made final on November 24, 1992.

Therefore, as in *Leaf*, the Court concludes that to the extent the complaint is or can be construed as a challenge to the November 24, 1992 denial of the plaintiff's request for renewal of his conditional license to practice law in Indiana the action must be **dismissed for lack of subject matter jurisdiction.**

The Court finds the situation otherwise, however, as to the plaintiff's general constitutional challenge to Rule 6(3) and the predominant practice requirement because federal district courts "have subject-matter jurisdiction over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state-court judgment in a particular case." *Feldman*, 460 U.S. at 486. *See also Schumacher v. Nix*, 965 F.2d 1262, 1266 n.6 (3rd Cir. 1992), *cert. denied*, 113 S. Ct. 1259 (1993). The Court therefore proceeds to discuss each of the plaintiff's challenges to Rule 6(3) and the predominant practice requirement.

D. Equal Protection

The *Admission Rules* are an exercise of the Indiana Supreme Court's rule-making authority and hence treated as legislation for equal protection purposes. *E.g., Salibra v. Supreme Court of Ohio*, 730 F.2d 1059, 1062 n.5 (6th Cir. 1984), *cert. denied*, 469 U.S. 917 (1984). The first order of business here, therefore, is to identify the correct

standard of scrutiny to which the *Admission Rules* are subject.

"As a general matter, economic and social legislation is subject to rational basis review, under which a law need only be 'rationally related to a legitimate state interest.' " *Schumacher v. Nix*, 965 F.2d 1262, 1266 (3d Cir. 1992) (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (footnote omitted)). Scariano argues that a higher standard is applicable, but his arguments in this respect are unpersuasive. The right to practice law without taking a bar examination is not a fundamental right for equal protection purposes. *Lowrie v. Goldenhersh*, 716 F.2d 401, 412 (7th Cir. 1983). Further, the "Constitution does not require that because a lawyer has been admitted to the bar of one State, he or she must be allowed to practice in another." *Leis v. Flynt*, 439 U.S. 438, 443 (1979).

In *Lowrie*, the Seventh Circuit concluded that the rational basis test was the proper standard to be applied to the challenge to an Illinois bar admission rule. *Lowrie* represents the great weight of authority which applies only the rational basis test to state bar admission requirements or restrictions. *Schumacher v. Nix*, 965 F.2d at 1268 (citing cases).

In *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859, 862 (4th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986), the plaintiff challenged the constitutionality of Virginia Bar Admission Rule 1A:1(d). Rule 1A:1(d) required that an applicant for admission to the Virginia bar "[i]ntend[] to practice full-time as a member of the Virginia bar." Both

the district court and the Fourth Circuit rejected the challenges to this rule.

Goldfarb explained that the full-time practice requirement had already challenged. "[A] three-judge federal panel upheld the rule . . . finding that the [full-time practice] requirement rationally served the interest of Virginia in insuring the competence of attorneys practicing in the Commonwealth." *Goldfarb*, 766 F.2d at 862, citing *Brown v. Supreme Court of Virginia*, 359 F. Supp. 549, 561-62 (E.D. Va.), *aff'd mem.*, 414 U.S. 1034 (1973). The summary affirmance by the Supreme Court "authoritatively [established] . . . that a rational basis lay beneath Rule 1A:1(d). . . . " *Id.*

The similarities between this case and *Goldfarb* are striking. *Goldfarb* speaks directly to the challenge which Scariano makes here by addressing "directly . . . the attorneys' amount of practice in other states."[6] The reason for the full-time practice requirement, moreover, was obviously to ensure familiarity with state law for those attorneys desiring to practice without passing the bar

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[6] It would appear that the full-time practice of law in Virginia leaves no opportunity to practice elsewhere. However, the Virginia Supreme Court interprets the full-time practice requirement of Rule 1A:1(d) to mean that an applicant must show that he intends to open an office in Virginia for the practice of law and to engage regularly in the practice of law in Virginia. *In Re Brown*, 191 S.E.2d 812, 815 n.3 (Va. 1972). Ironically, however, it was noted in a later case that "Virginia has established no enforcement machinery to monitor compliance with its full-time practice requirement." *Friedman v. Supreme Court of Virginia*, 822 F.2d 423, 429 (4th Cir. 1987).

examination. This was "surely a legitimate state purpose." *Goldfarb*, 766 F.2d at 862.

Although the plaintiff may point to his case as an example of the Rule resulting in inequality in some fashion, incidental individual inequality does not make such rules offensive to the Fourteenth Amendment. *Martin v. Walton*, 368 U.S. 25, 26 (1961). Indiana has not required that a bar applicant (under Rule 6(3) or otherwise) become a resident or even maintain an office in this State. Also, the wisdom or efficacy of the predominant practice requirement is a subject beyond judicial fiat. As stated in *Lowrie*, "[u]nder the mere rationality level of review, it is of no moment that the rule is not the least restrictive means to a permissible end, and . . . may not be the best way to ensure character and fitness." *Lowrie*, 716 F.2d at 409. This point was also made in *Goldfarb*:

> We recognize that Goldfarb's experience and familiarity with state law may be such that the full-time practice requirement is unnecessary to guarantee that he would ably serve the clients and courts that would depend on him in Virginia. But surely he suffers no more from the presumptions of Rule 1A:1(d) than he did his counterpart in *Martin v. Walton*, 368 U.S. 25, 7 L. Ed. 2d 5, 82 S. Ct. 1 (1961). The petitioner in that case lived in Kansas and practiced in Kansas City, Missouri. A Kansas rule required him, as a part-time practitioner, to affiliate with local counsel for his Kansas appearances even though he had passed the Kansas bar examination, had published an article on Kansas procedure, and had served as city attorney for his Kansas town and as a member of the Kansas Board of Tax Appeals. *See Martin v. Davis*, 187 Kan. 473, 357

> P.2d 782 (1960). The Supreme Court dismissed his due process challenge to the Kansas rule for want of a substantial federal question, holding that the full-time practice requirement – both on its face and as applied – was "not beyond the allowable range of state action under the Fourteenth Amendment." *Martin v. Walton*, 368 U.S. at 25-26. The same deference to state regulation is appropriate here. Our role is not to conduce an individual inquiry into Goldfarb's qualifications; Virginia offers a special hearing on that question through its bar examination. Our role is instead to determine whether Virginia has adopted a rational approach to the serious problem of attorney incompetence. We can only conclude that it has.

766 F.2d at 862. Therefore, Rule 6 is not violative of the Equal Protection Clause merely because there may be a better, more direct way of ensuring the competence of attorneys who apply for admission under the rule or because the rule may work an unfair hardship in a particular case. *See Whitfeld v. Illinois Board of Law Examiners*, 504 F.2d 474, 476 (7th Cir. 1974). Indiana's predominant practice requirement forces familiarity with Indiana law. This fosters the State's legitimate interest in regulating and maintaining the quality of those persons admitted to practice law and this rationale is sufficient to show that the challenged rule does not violate the Equal Protection Clause. *See Sestric v. Clark*, 765 F.2d 655, 663 (7th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986).

When applying the rational basis test a court is free to uphold a classification based upon "a[ny] state of facts that reasonably can be conceived to constitute a distinction or difference in State policy. . . . " *Allied Stores v.*

Bowers, 358 U.S. 522, 530 (1959). Those facts are more than evident from the face of Rule 6(3). On the basis of the foregoing, therefore, the Court cannot conclude that Admission Rule 6 is not rationally related to a legitimate state interest. It thus survives the plaintiff's equal protection challenge.

E. Right to Travel

Although not asserted as a separate count in the complaint, Scariano asserts that the "predominant practice requirement . . . burdens the right to travel protected by the Constitution. . . . " (Paragraph 26). The right of citizens to be free from unreasonable restrictions on their ability to travel interstate is drawn from Article IV, Section 2, of the Constitution and Section I of the Fourteenth Amendment. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618 (1969). The practice of law, however, is not a fundamental right or activity. *Leis v. Flynt*, 439 U.S. 438, 444 (1979).

A state law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). Although Scariano would have this Court believe that the predominant practice rule directly restricts the multi-state practice of law and is therefore an impediment to his right to travel, this is not a conclusion with which the Court agrees. As explained in *Lowrie*, 716 F.2d at 412, "[r]equiring Lowrie to sit for and pass the bar examination does not amount to a denial of a basic necessity of life . . . nor does it infringe on a fundamental

right." The Court does not find that the right to travel has been implicated as a result of Rule 6. Even if implicated, there is no allegation that impeding travel is the primary objective of Rule 6, nor is there an allegation that Rule 6 uses any classification which serves to penalize the exercise of Scariano's right to travel. Simply stated, Admission Rule 6 provides attorneys such as the plaintiff with an alternative to sitting for the Indiana Bar Examination. If that alternative is not appealing to him, he may pursue the other route: sit for the Indiana Bar Examination. The requirements of Admission Rule 6 do not violate the right to travel.

F. Interstate Commerce Clause

The plaintiff claims that the predominant practice requirement unreasonably burdens interstate commerce. Article I, Section 8 of the Constitution grants Congress the power to regulate commerce among the states. When a state law directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the law is generally to be invalidated. *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986). A pertinent test was announced in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), where the Supreme Court indicated that a statute will be upheld where effects on interstate commerce are incidental "unless the burden on such commerce is clearly excessive in relation to the putative local benefits."

As with most bar admission requirements in most jurisdictions, the "putative local benefit" of Rule 6(3) is

that persons admitted to practice law in Indiana without having first taken its bar examination are nonetheless familiar with Indiana law. This is an important state interest and it does not appear that the plaintiff could demonstrate that the burden on commerce is "clearly excessive" in relation to that purpose.

Scariano also concedes that if all attorneys were required to pass the bar examination, the effect on interstate commerce would only be indirect. Goldfarb made a similar concession. Such a concession dooms this argument to failure. "If a state may constitutionally require all applicants to take the examination, the Commerce Clause is not offended by a rule which permits some, but not all, out-of-state attorneys to be admitted on waiver of the examination." *Shapiro v. Cooke*, 552 F.Supp. 581 (N.D.N.Y. 1982), *aff'd*, 702 F.2d 46 (2d Cir. 1983). *See also Attwell v. Nichols*, 466 F. Supp. 206 (N.D.Ga. 1979), *aff'd*, 608 F.2d 228 (5th Cir. 1979), *reh'g denied*, 612 F.2d 579 (5th Cir. 1979).

Scariano makes the untenable assertion that the rule in *Goldfarb* "did not speak directly to the attorneys' amount of practice in other states and was viewed only as a requirement of a minimum level of practice in Virginia." (Plaintiff's Memorandum in Opposition to Motion to Dismiss, page 21). The reason the Court finds this contention untenable bears further discussion.

Even treating Virginia's full-time practice rule as only a requirement of a minimum level of practice in Virginia, it is incongruous for him to also argue that Indiana's less onerous predominant practice requirement "directly, significantly, unjustifiably, and unreasonably interferes with

interstate commerce." (Complaint, paragraph 30). "The state can hardly be penalized for offering a choice between a requirement it can concededly exact and one that many attorneys may find less onerous." *Goldfarb*, 766 F.2d at 863.

Conclusion

States have the authority to cause individuals desiring to practice law to meet certain minimum requirements as a means of ensuring that those who practice law in a given state are competent to do so. "The reason why preparatory study, educational qualifications, experience, examination and license by the courts are required, is not to protect the bar . . . but to protect the public." *People v. Alfani*, 125 N.E. 671, 673 (N.Y. 1919). *See also Crosetto v. State Bar of Wisconsin*, 12 F.3d 1396 (7th Cir. 1993) (reaffirming that "the regulation of the activities of the bar is at the core of the State's power to protect the public. . . . Few other professions are as close to the core of the State's power to protect the public. Nor is any trade or other profession as essential to the primary governmental function of administering justice." (quoting *Hoover v. Ronwin*, 466 U.S. 558, 569 n.18 (1984)).

Although the requirements for conditional bar admission in Indiana under Admission Rule 6(3) may have certain indirect consequences, these do not rise to the level of an Equal Protection violation, a violation of the Interstate Commerce Clause or a violation of the Right to Travel. Accordingly, the Court finds that the defendants' motion to dismiss must be granted and the complaint dismissed for failure to state a claim upon

which relief can be granted. Finding no possible amendment which would salvage the plaintiff's claims, the Court also directs the entry of judgment dismissing the cause of action with prejudice. However, to the extent that the complaint can be construed to challenge the Indiana Supreme Court's actual decision in Scariano's case, this action must be dismissed for lack of subject matter jurisdiction.

ALL OF WHICH IS ORDERED this 25th day of March 1994.

/s/ Sarah Evans Barker
SARAH EVANS BARKER,
Chief Judge
United States
District Court

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 94-1783

ANTHONY G. SCARIANO,

Plaintiff-Appellant,

v.

JUSTICES OF THE SUPREME COURT
OF THE STATE OF INDIANA;
and MEMBERS OF THE
STATE BOARD OF LAW
EXAMINERS OF THE
STATE OF INDIANA,

Defendants-Appellees.

On Petition for Rehearing and Rehearing En Banc

REHEARING and SUGGESTION for
REHEARING EN BANC DENIED – FEBRUARY 2, 1995

Before POSNER, *Chief Judge*, CUMMINGS, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE and ROVNER, *Circuit Judges*.

On November 9, 1994, the petitioner filed a petition for rehearing with suggestion for rehearing en banc. An answer to the petition was requested and filed. All of the judges on the original panel, CUMMINGS, BAUER, and CUDAHY, *Circuit Judges*, voted to deny a rehearing. A judge in regular active service requested a vote on the suggestion

for rehearing en banc and the majority of the judges voted to deny an en banc rehearing. POSNER, *Chief Judge*, FLAUM and ROVNER, *Circuit Judges*, voted to grant rehearing. Accordingly, the petition for rehearing is hereby DENIED.

POSNER, *Chief Judge*, dissenting from denial of rehearing en banc. The commerce clause of Article I of the Constitution has been interpreted to forbid states to erect unreasonable barriers to interstate trade, and "trade" for these purposes includes the practice of law. *Sestric v. Clark*, 765 F.2d 655, 661 (7th Cir. 1985). The Indiana rule which the panel's decision upholds places a kind of tax on the practice of law in other states by permitting a lawyer to practice in Indiana without taking and passing the Indiana bar exam if the lawyer's practice is more than 50 percent "in Indiana."

To see the effect of the rule, compare, first, two lawyers, each of whom is licensed in Illinois and practices in both Illinois and Indiana. The first lawyer bills his Illinois clients for 900 hours of work a year and his Indiana clients for the same number. The second lawyer bills his Illinois clients for 500 hours and his Indiana clients for 800. The second lawyer can gain admission to the Indiana bar without taking the Indiana bar exam. The first cannot, even though he has the larger Indiana practice. He will have an incentive to reduce the Illinois component of his practice in order to become eligible to join the Indiana bar without taking the bar exam.

When a state law is obviously protectionist – a tariff would be the clearest example – it is generally found to violate the commerce clause without further ado; in other

cases, such as this, the test is whether the benefits of the law in advancing some legitimate interest of the state exceed the costs in impairing free trade among the states. E.g., *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986); *Bendix Auto-lite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 891 (1988); *Government Suppliers Consolidating Services, Inc. v. Bayh*, 975 F.2d 1267, 1277-79 (7th Cir. 1992). The distortion of the interstate practice of law brought about by the challenged rule is small; for it is limited, as the panel stressed, by the costs (mainly in time) of sitting for the Indiana bar exam. But the benefits are not only slight; they are negligible, because the rule is not designed to promote any legitimate interest of the state.

States have an interest in assuring the minimum competence of the lawyers who practice in their courts and advise their citizens. Most economists would believe that this interest could be best protected by allowing free competition among lawyers. Indiana is not required to subscribe to that belief. It can establish conditions for admission to its bar that are designed, paternalistically, to protect its citizens from falling into the clutches of incompetent or dishonest lawyers. It can, in particular, require as a condition of admission to its bar that lawyers take and pass its bar exam. The challenged rule establishes an alternative condition. The alternative, which is probably designed to give a break to lawyers who practice primarily or even exclusively in Indiana but happen to live in an adjacent state, allows the substitution of practical experience with Indiana law for ability to pass a test.

Or does it? Consider first the not uncommon case of a person who practices law part time. The rule requires

that the lawyer seeking to take advantage of it practice "actively" in Indiana, but obviously that does not mean full-time. Suppose the lawyer practices 500 hours a year, 300 of them in Indiana. He would be entitled to admission to the Indiana bar (conditionally, until he had fulfilled the predominance requirement for five consecutive years), even though a lawyer who practiced twice as much in Indiana but more elsewhere would have to take the bar exam. This is an irrational distinction and a burden on the practice of law in the other states. It does not merely create the kind of hard case that is inevitable whenever lines must be drawn. It is rooted in the irrationality of measuring competence in Indiana law by the ratio of one's Indiana practice to one's out of state practice instead of by the amount of one's Indiana practice. How much or how little one does elsewhere is irrelevant to one's competence to practice law in Indiana, save as one's out of state practice affects the size of one's Indiana practice. Confining the waiver of the bar exam to full-time practitioners in Indiana would be a measure at least rationally related to the state's interest in protecting its consumers of legal services. *Goldfarb v. Supreme Court of Virginia*, 766 F.2d 859 (4th Cir. 1985). Indiana's rule is not.

Consider next the case of a person who practices law in Washington, D.C., and whose major client is Eli Lilly, a large Indiana firm, which the lawyer represents exclusively before the Food and Drug Administration. The lawyer knows no Indiana law; he has never handled a problem involving Indiana law, either for Eli Lilly or for anyone else. But if more than 50 percent of his practice is representing Lilly, he is entitled to be admitted to the Indiana bar without taking the bar exam, because the rule

defines the practice of law "in Indiana" to include representing Indiana clients anywhere. A similar example would be a products-liability lawyer in Hawaii whose predominant practice was defending products-liability suits brought against Eli Lilly under the law of Hawaii and who like my FDA lawyer had no knowledge of or experience with the law of Indiana. Again these are not just the inevitable hard cases. They are rooted in the irrationality of defining the practice of Indiana law with reference to the residence of clients rather than to the nature of the legal work done for them.

It is not as if an alternative rule designed to allow the substitution of practical experience for taking the bar exam as a token of competence would generate equivalent irrationalities; in that event Indiana's rule, though bad, might be as good as circumstances permitted. If the rule simply required some minimum number of hours a year practicing law in Indiana, with "practice in Indiana" defined as practicing in the courts of Indiana (including the federal courts of Indiana in diversity cases) and before Indiana administrative agencies, or providing advice on matters of Indiana law, it would not produce the irrational results that the challenged rule is bound to produce. It also would not (unless the minimum were set very high) constitute a tax on having a large practice outside Indiana, as the challenged rule does. The rule discriminates against the practice of law outside Indiana without contributing appreciably to the state's legitimate interest in having knowledgeable lawyers. The rule flunks the laxest sort of balancing test.

I am mindful that if the rule were invalidated, as I think it should be, Indiana might respond by making all

lawyers who want to practice law in Indiana take the Indiana bar exam. But that is speculation. The pressures that led Indiana to adopt the present rule are at least as likely to induce it to adopt a rational substitute.

The fact that I disagree with the panel's decision is of course not a sufficient basis for wanting to hear the case argued en banc. But keeping the channels of interstate commerce free from unreasonable obstructions (obstructions that include constraints and incentives concerning where lawyers practice) is a particularly important responsibility of federal judges and one we are especially competent to discharge when the commerce in question is the commerce in legal services. We are lawyers ourselves. We understand this branch of commerce.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit